No. 90-33

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CORNING NATURAL GAS CORPORATION,
Petitioner,

vs.

NORTH PENN GAS COMPANY,
Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. May specific personal jurisdiction be exercised over an out-of-state corporation which has no physical presence in the forum state?

2. Did the Third Circuit "recognize" that specific personal jurisdiction could not exist over petitioner Corning Natural Gas Corporation with respect to the Sales Agreement between the parties?

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STATEMENT OF THE CASE

Statement of the Facts

Respondent North Penn Gas Company (hereinafter "North Penn")[1] is an interstate natural gas pipeline

1. North Penn is a wholly-owned subsidiary of Penn Fuel Gas, Inc., a Pennsylvania business corporation.

company incorporated in the Commonwealth of Pennsylvania and engaged in the purchase, pipeline transmission, storage, and wholesale and retail sale of natural gas. Its principal offices are in Port Allegany, Pennsylvania. Its gas pipeline system is located in north central Pennsylvania, with portions in Tioga County, where the Company also has underground natural gas storage fields accessed by its pipelines. North Penn's interstate operations are subject to the jurisdiction of the Federal Energy Regulatory Commission (hereinafter "FERC"). Its intrastate operations are subject to the jurisdiction of the Pennsylvania Public Utility Commission.

Petitioner Corning Natural Gas Corporation (hereinafter "Corning") is a natural gas supplier with headquarters in the city of Corning, New York in Steuben County, which adjoins Pennsylvania's Tioga County. Corning purchases natural gas from interstate pipeline companies, including North Penn, to serve wholesale and retail customers in south central New York, including residential and commercial customers in municipalities within Steuben County and Chemung County, New York.

North Penn's pipelines and Corning's pipelines connect with each other near the Pennsylvania-New York border that runs between Tioga County, Pennsylvania and the Steuben and Chemung Counties of New York.

Before 1954, Corning was a subsidiary of North Penn. Under a succession of contracts from 1954 until immediately prior to the initiation of this suit, Corning was also North Penn's principal wholesale customer, accounting for between 87% to 95% of North Penn's yearly wholesale business. In each year from 1967 to 1987 for example, Corning purchased from $6.2 million to $42.2 million dollars in natural gas services from its neighbor North Penn. During the 30-year period of their relationship, Corning each month sent payments to North Penn's Pennsylvania depositories for natural gas services purchased from North Penn.

In August 1985 North Penn filed with the FERC revisions to its rate schedules for its wholesale contract customers, including Corning. Thereafter, Corning formally intervened in the FERC proceeding and requested that North Penn be required to amend its rate schedule filing in order to "unbundle" its services. This unbundling was to occur by North Penn establishing separate tariff rate schedules for natural gas storage service, transportation service and sales service, and by establishing separate storage service and transportation service agreements with Corning, as well as a revised gas Sales Agreement to supersede the existing agreement between Corning and North Penn.

Following negotiations with Corning, North Penn on June 6, 1986, by stipulation and agreement, acceded to the request for unbundling and supplemented its filing to include for FERC approval: separate storage service and transportation rate schedules, a revised sales service schedule and proposed Storage Service, Transportation Service and revised Sales Service Agreements with Corning. In its amended filing, North Penn specifically informed the FERC that it would be providing storage service to Corning by utilizing North Penn's storage fields in Tioga County, Pennsylvania. North Penn likewise included in this amended filing an application for a certificate of public convenience and necessity so that North Penn could provide Corning with the unbundled sales, storage, and transportation services Corning sought from North Penn under the agreements in question.

On July 3, 1986, FERC issued a notice of the filing of North Penn's aforementioned application. In the notice FERC stated that North Penn was to provide Corning with storage service of up to 5,000 Mcf per day or 500,000 Mcf per heating season. The notice specifically stated that the storage service would be provided to Corning from North Penn's storage facilities located in Tioga County, Pennsylvania.

On August 26, 1986, Corning, by its counsel, filed with the FERC a letter stating that, "Corning continues to strongly support the certificate application filed by North Penn and to *urge* its expeditious approval by the [Federal Energy Regulatory] Commission" (emphasis added). In the letter Corning's counsel also stated, "*As explained by Corning in two previous letters filed in this docket*, the proposed storage service (combined with the Transportation Service) would enable it to obtain lower priced, competitive supplies of natural gas from other sources" (emphasis added).

On September 4, 1986, Corning and its own principal whole sale customer, New York State Electric and Gas Corporation, filed a Joint Motion with the FERC supporting the North Penn filings and once more urging their *"expeditious"* approval.

Subject to FERC approval of the North Penn filings, Corning on September 4, 1986, also executed the revised Sales Agreement, the Storage Agreement, and the Transportation Agreement that were the subject of both the June 6, 1986 amended North Penn rate schedule filings and the June 6, 1986 North Penn certificate application before the FERC.

The signing of these Agreements was preceded by extensive negotiations between Corning and North Penn that concerned the terms and conditions thereof and that occurred during the period June 6, 1986 to September 4, 1986. The negotiations were conducted over telephone and by mail and included at least one call from Corning's Vice President directly to North Penn's Treasurer at its Pennsylvania offices. They culminated on September 5, 1986, with Corning's mailing of its executed copies of the Agreements to North Penn's Treasurer at its main Pennsylvania offices for final signature and for North Penn's subsequent submission of the Agreements to the FERC.

The FERC on December 12, 1986, issued an order which granted North Penn's request for a certificate of

public convenience to provide Corning with the storage service sought by it and with other natural gas services. The order identified the location of that storage service as North Penn's storage fields in Tioga County, Pennsylvania. Also on that day the FERC issued an order accepting for implementation the North Penn storage service rate schedule and revised sales service rate schedule.

Thereafter, North Penn provided natural gas storage service and pipeline gas sales service to Corning under the Agreements in question and pursuant to the FERC-issued December 12, 1986 certificate of public convenience.

Under the Storage Agreement and the FERC December 12, 1986 order issuing the certificate of public convenience, Corning had the right to store up to 5,000 Mcf of gas per day and 5,000,000 Mcf of gas per heating season in North Penn's Pennsylvania storage fields. Even if Corning stored no gas in those fields, under North Penn's FERC storage service rate schedule Corning was required to pay North Penn a minimum monthly charge for this storage right. North Penn was likewise required to stand ready to receive or withdraw gas from these Pennsylvania fields at Corning's request, up to the gas volumes in question.

In each month from January 1987 through October 1987 Corning made the minimum monthly payments required under the Storage Agreement to North Penn's depository in Pennsylvania. Thereafter, in breach of said agreement Corning ceased such payments. In its Complaint, North Penn contends that such payment obligation continues to this day.

The Storage Agreement required that the agreement be interpreted and enforced in accordance with the laws of Pennsylvania and that all notices, demands and requests by Corning be made in writing and sent to North Penn's corporate headquarters in Pennsylvania.

Under the Sales Agreement and its accompanying FERC rate schedule, Corning had the right to purchase 60,908 Mcf of natural gas per day and 7,900,000 Mcf of natural gas per year. In addition, Corning was required to pay North Penn a minimum monthly charge for the right to purchase these volumes on demand from North Penn. Like the Storage Agreement, the Sales Agreement also required that all notices from Corning be sent to North Penn's Pennsylvania address.

From January 1987 through October 1987 Corning, on a monthly basis, sent payments to North Penn's Pennsylvania depository on account of 4,029,110 Mcf in gas purchased by Corning and delivered to it through North Penn's Tioga County gas pipelines and on account of the minimum monthly demand charge required by the Sales Agreement.

After October 1987, Corning ceased making minimum payments to North Penn under the Sales Agreement and notified North Penn that it was terminating the agreement. North Penn's complaint asserts that Corning remains obligated to reimburse North Penn for sales service provided after that date.

During 1987, under the Storage and Sales Agreements Corning made in excess of $13,000,000 in monthly payments to North Penn's depositories in Pennsylvania, including over $3,000,000 in minimum monthly charge payments.

Procedural History

On July 19, 1988, North Penn filed a complaint against Corning in United States District Court for the Middle District of Pennsylvania asserting diversity jurisdiction under 28 U.S.C. §1332(a)(1).

In separate counts of its complaint, North Penn alleged that for the period November 1987 through June 1988 Corning owed it $171,141.86 in minimum monthly

storage charges and $2,272,279.15 in minimum monthly sales charges.

Corning filed a motion to dismiss pursuant to F.R.Civ.P. 12(b)(2) alleging lack of *in personam* jurisdiction over Corning under Pennsylvania's Long-Arm Statute, 42 Pa. C.S. §§3501 *et seq.* Following hearing and submission of affidavits and exhibits, the trial court in an unpublished March 16, 1989 memorandum opinion (Pet., pp. 26a-34a) granted the Corning motion. The trial court concluded that it lacked specific personal jurisdiction over Corning because "all evidence presented indicated that Corning has no physical presence in Pennsylvania" (Pet., p. 33a).

North Penn thereafter filed a notice of appeal with the U.S. Third Court of Appeals. Following argument before a three judge panel, the Court of Appeals on January 2, 1990 issued an unpublished opinion and order (Mannsman, J., dissenting) (Pet., pp. 13a-25a) affirming the lower court. North Penn thereupon filed a petition for rehearing. In the petition it pointed out factual errors made by the two judge majority in arriving at its opinion and directed the court's attention to minimum contacts between Corning and the forum which had been overlooked by the judges.

On February 22, 1990, the Court of Appeals granted North Penn's petition for rehearing and vacated its January 2, 1990 opinion (Pet., p. 12a). On March 5, 1990, the Court of Appeals issued a *per curiam* opinion and order reversing the trial court and remanding the matter for reinstatement of the complaint (Pet., pp. 3a-11a).

In its March 5, 1990 opinion, the Appeals Court concluded that the district court had erred in deciding the issue of specific personal jurisdiction based solely on Corning's lack of "physical presence" in Pennsylvania (Pet., p. 10a). The Court of Appeals further concluded that, in view of its several contacts with Pennsylvania under Storage and Sales Agreements, Corning had

established purposeful contacts with Pennsylvania as evidenced by Corning's aggressive pursuit of these Agreements before the FERC. Accordingly, the Court of Appeals concluded that specific personal jurisdiction did exist over Corning under the complaint (Pet., pp. 10a-11a).

Following the Court of Appeals' March 5, 1990 opinion and order, Corning thereupon filed a petition for rehearing, which was then denied by order of the Court of Appeals on April 3, 1990 (Pet., p. 1a). The instant petition for writ of certiorari followed.

SUMMARY OF REASONS FOR DENIAL OF PETITION

The Court of Appeals decision finding specific personal jurisdiction over Corning is consistent with this Court's ruling in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985). The Court of Appeals applied the same minimum contacts test of specific personal jurisdiction as is recited in *Burger King* and other decisions of this Court.

Corning points to no decisions of this Court or of the other Circuit Courts which contradict the Court of Appeals in this matter. The two opinions of this Court which Corning cites as contradicting the Court of Appeals both concern general, as opposed to specific, jurisdiction. The allegedly contradicting Circuit Court decisions cited by Corning are clearly distinguishable on the facts from the instant matter. They reject specific personal jurisdiction in circumstances where the defendant resided far distant from the forum and had contacts with the forum that were significantly limited and/or that were initiated solely by the plaintiff.

Contrary to Corning's petition, *Burger King's* holdings are not limited to franchisor-franchisee relationships. It is therefore immaterial that the Court of Appeals' findings in favor of specific personal jurisdiction

over Corning did not in each and every respect mirror the findings of fact in *Burger King*.

Equally immaterial is Corning's assertion that its lack of an ongoing "physical presence" in the forum is fatal to specific personal jurisdiction. The Court of Appeals, repeating the holdings of this Court, correctly observed that "physical presence" is not a prerequisite for personal jurisdiction.

Corning asserts that the Court of Appeals' opinion in favor of specific personal jurisdiction is based *solely* on the economic impact, albeit substantial, that Corning's failure to make payments for North Penn services will have on the forum. This assertion is incorrect. The Appeals Court found specific personal jurisdiction based upon an entire complex of minimum contacts between Corning and Pennsylvania and not solely upon economic impact.

Notwithstanding Corning's claims, nowhere in its opinion does the Court of Appeals in *North Penn v. Corning* "recognize," conclude, or find that personal jurisdiction does not exist over Corning in regard to the Sales Agreement count of the complaint. The Appeals Court in reciting the minimum contacts between Corning and Pennsylvania cites minimum contacts existing under *both* the Storage and the Sales Agreement. Corning's claim that the court asserted mere "pendent jurisdiction" over Corning under the Sales Agreement count is belied by these minimum contacts found by the court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Third Circuit's Conclusion That, if Minimum Contacts are Found, then Specific Personal Jurisdiction May Be Exercised over an Out-of-State Corporation which Lacks Physical Presence in the Forum State is Not Contrary to any Ruling of This Court or of the Other Circuit Courts.

A. Exercise of Specific Personal Jurisdiction Does Not Require that a Defendant Corporation Have an On-Going Physical Presence in the Forum State.

To support its petition, Corning avers that the Appeals Court erred in concluding that specific personal jurisdiction may be exercised over Corning in Pennsylvania even though "Corning has no property, no employees, and no business activities in the forum state" (Pet., Questions Presented).

This lack of Corning's on-going "physical presence" in Pennsylvania was the basis of the trial court's refusal to exercise specific personal jurisdiction over Corning (Pet., p. 33a). Nevertheless, the Third Circuit both in its vacated January 2, 1990 opinion (Pet., p. 17a, fn. 2; p. 23a, fn. 2) and in its final, March 5, 1990 opinion (Pet., p. 10a) criticized the trial court for relying on "physical presence" as its test of special personal jurisdiction. As the Appeals Court noted in its March 5, 1990 opinion, " '[j]urisdiction may not be avoided merely because the defendant did not *physically* enter the forum state.' *Burger King v. Rudzewicz,* 471 U.S. 462, 476 (1985)." (Pet., p. 10a).

In its petition to this Court, Corning directs us to no ruling of the Supreme Court or of the Circuit Courts of Appeals which holds that a defendant out-of-state corporation *must* have a "physical presence" in the forum in order, under the Due Process Clause, to be made subject to specific personal jurisdiction. There exists, in

fact, no such holding. Accordingly, Corning's petition should be denied.

B. The Third Circuit's Ruling That Specific Personal Jurisdiction Exists over Corning Is Not Based "Solely on the Tangential Economic Impact" of Corning's Gas Purchases, But Is Based on Corning's Complex of Minimum Contacts with Pennsylvania.

In support of its petition, Corning incorrectly asserts that the Court of Appeals' finding of specific personal jurisdiction over Corning is based "solely on the tangential economic impact that payments for out-of-state [natural gas] purchases have on the forum state" (Pet., p. 8). Not only does Corning here misstate a factor relied upon by the Court of Appeals to find jurisdiction, Corning materially mischaracterizes it as the *sole* factor.

When the Appeals Court determined that specific personal jurisdiction existed over Corning, it was not merely because of the economic impact of Corning's failure to make mandated payments into Pennsylvania. Rather, it was because of a *complex* of contacts which Corning had made with Pennsylvania and which related to the claims raised in the North Penn complaint. These contacts, the court found, satisfied the minimum contacts test of *Burger King Corp v. Rudzewicz,* 471 U.S. 462 (1985), *Hanson v. Denckla,* 357 U.S. 235 (1958), and decisions in that same line (Pet., pp. 8a-10a).

In detailing these minimum contacts, the Court of Appeals noted that the Storage Agreement entered into by Corning with North Penn specified that Pennsylvania law would govern (Pet., p. 6a), that both the Storage and Sales Agreements required Corning to deliver all notices to North Penn's principal business address in Pennsylvania (Pet., p. 7a), and that the situs of performance of the Storage Agreement was in Pennsylvania (Pet., p. 6a). The Appeals Court concluded that:

> "It follows that Corning purposefully established minimum contacts with Pennsylvania through the services received under the Storage Agreement with North Penn, the 30 year relationship with North Penn, its voluntary participation in the continuation of that relationship (as shown through its intervention in North Penn's rate and certification proceedings before the FERC), and the transmittal of payments into Pennsylvania. Such facts dictate a finding of *in personam* jurisdiction." (Pet., pp. 10a-11a)

Accordingly, the Third Circuit Court of Appeals clearly did *not* base its finding that specific personal jurisdiction exists over Corning *solely* on the economic impact (tangential or otherwise) that Corning's failure to make required reimbursement would have on Pennsylvania.

Moreover, in view of the Appeals Court's reliance on not one, but a complex of minimum contacts, it must also be concluded that the three Circuit Court opinions regarding "economic impact" that were cited by Corning (Petition, p. 9) fail to support Corning's argument that the Appeals Court erred in concluding that specific personal jurisdiction existed over Corning.[2]

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2. In the first opinion cited by Corning, *Dollar Savings Bank v. First Security Bank of Utah, N.A.*, 746 F.2d 208, 213 (3rd Cir. 1984), the Circuit Court rejected specific *in personam* jurisdiction when the defendant debtor's " *only* contacts are that the funds [borrowed] originated and were repaid in the forum state." (Emphasis added). In the second, *Savin v. Ranier,* 898 F.2d 304, 306-307 (2nd Cir. 1990), the court declined to find specific personal jurisdiction when that defendant debtor's *only* contacts with the forum state were that he executed a promissory note with a forum resident under which he was to make payments into the forum. In the third opinion cited by Corning, *Stuart v. Spademan,* 772 F.2d 1185, 1194 (5th Cir. 1985) the court held that, "[t]he *random* use of interstate commerce to negotiate and close a particular contact, the *isolated* shipment of goods to the forum at the *instigation* of the resident plaintiffs, and the mailing of payments to the forum do not constitute the minimum contacts necessary to constitutionally

In addition to vainly attempting to characterize the Court of Appeals' *North Penn v. Corning* decision as based solely on "economic impact," Corning questions the Appeals Court's conclusion that, under the Storage Agreement, Pennsylvania was the contemplated site of storage service (Pet., p. 10, fn. 5). Unfortunately for Corning, this is not only a finding of the Court of Appeals, but of the trial court as well, which found "... the Storage Agreement provided that storage service was available to Corning in North Penn's Pennsylvania fields" (Pet., p. 33a). As the Appeals Court noted (Pet., p. 5a), a district court's findings on appeal will not be disturbed unless clearly erroneous. *Stranahan Gear Co. v. N L Industries,* 800 F.2d 53, 56 (3d Cir. 1986). Corning failed to identify such clear error before the Court of Appeals and it has failed to identify such error here.

Lastly, it must be noted that Corning's implication that the gas sales it received from North Penn constituted "out-of-state purchases" (Pet., p. 8) is without foundation in either the findings of the trial court or the Court of Appeals. At best, both courts addressed the sales made by North Penn to Corning as involving delivery of gas "at the New York-Pennsylvania border" (Pet., p. 6a, fn. 1; p. 32a), but did not make any findings concerning where the point of purchase actually occurred.

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exercise jurisdiction...." (Emphasis added).

Thus, the *Dollar Savings, Savin,* and *Stuart* opinions are patently distinguishable on their facts from the Court of Appeals decision in this matter, focusing as these opinions do on payments sent into the forum state as the *sole* purposeful contact made by the defendant with the forum.

C. The Third Circuit's Decision Does Not Conflict with this Court's Holding in Burger King, Other Decisions of this Court, or of the Circuits

To support its assertion that the Court of Appeals' decision is in material conflict with *Burger King*, Corning argues that the rulings in *Burger King* are limited to franchisor-franchisee type contracts (Pet., p. 11). Moreover, Corning contends that because the contractual relationship between North Penn and Corning in the instant matter does not in all respects mirror the "unique" facts in *Burger King, Burger King* provides insufficient precedent for the Court of Appeals' ruling. (Pet., pp. 12-13).

Contrary to Corning's argument, *Burger King* nowhere holds that specific personal jurisdiction may exist only within the context a franchisor-franchisee relationship or only if all facts present in *Burger King* are repeated in the matter under consideration. The *Burger King Court* instead clearly states:

> "The Court long ago rejected the notion that personal jurisdiction might turn on *'mechanical' tests, International Shoe Co. v. Washington*, supra, at 319, 90 L Ed 95, 66 S Ct 154, 161 ALR 1057, or on 'conceptualistic ... theories of the place of contracting or of performance,' *Hoopeston Canning Co v. Cullen, supra,* at 316, 87 L Ed 777, 63 S Ct 602, 145 ALR 1113. Instead, we have emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' *Id.,* at 316-317, 87 L Ed 777, 63 S Ct 602, 145 ALR 1113. It is these factors--prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing--that must be evaluated in determining whether the defendant

purposefully established minimum contacts within the forum." 471 U.S. at 479. (Emphasis added).

Despite Corning's assertions, it is the purposeful establishment of minimum contacts which the Appeals Court focused on rather than any fact-specific or totemistic test of personal jurisdiction (Pet., pp. 8a, 10a). In its analysis the Court of Appeals thus avoided the mechanical approach to determining jurisdiction that the *Burger King* Court cautioned against, but which approach Corning would clearly have the Court of Appeals use in order to decide jurisdiction.[3]

Besides allegedly being in conflict with *Burger King*, Corning also alleges that the Court of Appeals is in conflict with (Pet., p. 10) *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) and Rosenberg Brothers & Co. v. Curtis Brown Co.,* 260 U.S. 516 (1923). However, both these opinions concern the plaintiff's assertion of *general* jurisdiction over the defendant (jurisdiction not based upon defendant's forum contacts that are related to or arise from the claim in question). In view of this, no conflict between the Third Circuit decision in *North Penn* and this Court's *Helicopteros* and *Rosenberg* decisions may therefore be properly claimed to exist in order to support certiorari in this matter.

Corning also cites three Circuit opinions as allegedly conflicting with the *North Penn* Appeals Court decision (Pet., p. 10). The asserted conflict, however, is not explained by Corning and does not, in fact, exist. None

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3. Corning would have specific personal jurisdiction found only if in each case the fact-pattern in *Burger King* were exactly duplicated (Pet., p. 12, fn. 6). Unmentioned by Corning is that the facts in *Burger King* are less compelling than other cases where, unlike *Burger King,* the contract in question was to be performed (*and* was breached) in the forum state. *See e.g.,* the holding in *Papachristou v. Turbines Inc.,* 902 F.2d 685, 686-687 (8th Cir. 1990), which was cited by Corning as an alleged misinterpretation of *Burger King* (Pet., p. 12, fn. 6).

of the Circuit opinions cited by Corning are remotely on point with the facts in *North Penn.*[4] All are distinguishable by defendant contacts with the forum which either were extremely limited in scope and/or were totally initiated by the plaintiff. They are also distinguishable by the defendant's great geographic distance from the forum. Thus, the opinions can hardly be said to be in conflict with the Third Circuit's ruling in *North Penn*, which concerns a defendant who is headquartered in a county adjoining the forum and who "aggressively pursued" contacts with the forum (Pet., p. 6a), including an agreement by which it received the right to substantial underground storage service in facilities located within that forum.

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4. In the first Circuit opinion cited, *U.S.S. Yachts, Inc. v. Ocean Yachts, Inc.*, 894 F.2d 9, 12-13 (1st Cir. 1990), the court held that, in a suit between a *Puerto Rican* partnership and a *New Jersey* corporate defendant, jurisdiction *in Puerto Rico* would be too attenuated because it was founded only upon the sending of three letters by the New Jersey corporation to plaintiff in the forum. The second opinion Corning cites, *Health Communications, Inc. v, Mariner Corp.*, 860 F.2d 460 (D.C. Cir. 1988) ruled that a *Texas* hotel management company could not be subject to specific personal jurisdiction *in the District of Columbia* when its only contact with that forum was its contract with an employee training firm that provided all its training services at locations outside the forum, but which chose to grade the training results at its headquarters in the forum. The third allegedly conflicting opinion, *Stranahan Gear Co., Inc. v. N L Industries, Inc.*, 800 F.2d 53, 58-59 (3rd Cir. 1986), concerned a *Louisiana* ship builder which contracted with a *New Jersey* gear box manufacturer that subsequently subcontracted for parts with a *Pennsylvania* parts supplier. The Stranahan appeals court ruled that the *Louisiana* ship builder could not be subjected to a third-party suit *in Pennsylvania* by the New Jersey manufacturer when a claim of Pennsylvania jurisdiction was based merely upon the manufacturer's own choice of a Pennsylvania parts supplier as subcontractor and upon two visits to Pennsylvania by the third-party defendant Louisiana ship builder made solely at the behest of the New Jersey manufacturer.

II. The Court of Appeals Did Not Conclude, Find, or Recognize That Specific Personal Jurisdiction Could Not Exist over Corning with Respect to the Sales Agreement

In its final argument in favor of certiorari, Corning claims that the Appeals Court, by implication, improperly exercised pendent party jurisdiction over Corning in regard to the Gas Sales Agreement claim in the North Penn complaint (Pet., pp. 15-18).

As the sole premise for its argument Corning asserts that, even if *in personam* jurisdiction exists over it in Pennsylvania due to its Storage Agreement with North Penn, the Appeals Court "*recognized* that [Corning] did not have sufficient contacts with Pennsylvania arising out of the Gas Sales Contact to subject petitioner to suit in Pennsylvania" (emphasis added) (Pet., p. 17).

Notwithstanding Corning's assertion, the Appeals Court's decision contains *no* such conclusion, finding or "recognition" of insufficient contacts. Further belying the Corning assertion is the Appeals Court's listing of the minimum contacts that exist between Corning and Pennsylvania under *both* the Gas Storage and Gas Sales Agreements. These contacts include the mandate under both Agreements that all notices must be sent to North Penn's Pennsylvania address (Pet., p. 7a), the $13 million in monthly payments made under the Agreements by Corning to North Penn's Pennsylvania depositories (Pet., pp. 6a-7a), Corning's "aggressive" pursuit of regulatory approval of both Agreements (Pet., p. 6a), and Corning's 30 year business relationship with North Penn involving ongoing obligations (Pet., p. 10a).

Although, as Corning states (Pet., p. 17) the Court of Appeals found the Storage Agreement to be "crucial to the minimum contacts analysis" (Pet., p. 9a), the court in conducting such analysis did not either discount minimum contacts arising under the Sales Agreement or state any exclusive reliance on the Storage Agreement

as the basis for finding personal jurisdiction. Accordingly, Corning may not in good faith assert that the Appeals Court "recognized" that specific personal jurisdiction could not be asserted against Corning under the Sales Agreement count of the complaint.

Corning nevertheless asserts that, pursuant to the holding in *Bowers v. NETI Technologies, Inc.,* 690 F.Supp. 349, 357 (E.D. Pa. 1988), the Appeals Court in *North Penn v. Corning* violated the doctrine of pendent jurisdiction by "lumping" the Sales Agreement count of the complaint with the Storage Agreement count (Pet., p. 17).[5] Corning cites *Bowers* for the proposition that the doctrine of pendent personal jurisdiction does not authorize subjecting a defendant to personal jurisdiction on one state claim when such subjugation is based upon a finding of personal jurisdiction over the defendant in another state claim (Pet., p. 16).

Bowers, however, is not on point with *North Penn v. Corning.* In *Bowers*, the plaintiff brought two separate diversity suits against the same defendants. In the first suit the defendants had consented to jurisdiction over their person in the out-of-state forum and in the subsequent second suit they did not. Plaintiffs attempted to consolidate the two suits in the out-of-state forum. The forum court failed to find in the second suit that it had long-arm jurisdiction over the defendants and declined to exercise "pendent personal jurisdiction" over them based merely upon their consent to jurisdiction in the first suit. *Bowers, supra,* 690 F.Supp. at 356-358. In terms of fairness, this result can hardly be deemed

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5. Pendent jurisdiction is a discretionary power of the federal courts exercised where no diversity jurisdiction exists over additional defendants who, with the state claims against them, are sought to be joined in a pending suit brought by plaintiff. Pendent jurisdiction will be exercised when all claims, both original and pendent, involve the same nucleus of operative facts and joinder is dictated by reasons of convenience, fairness, and judicial economy. *See United Mine Workers v. Gibbs,* 383 U.S. 715 (1966).

surprising given that, absent the defendants' consent, long-arm personal jurisdiction over them even in the first suit would also not have been possible.

In its petition, Corning, in any event, immediately contradicts the holding in *Bowers* by citing the district court ruling *Val Leasing, Inc. v. Hutson,* 674 F.Supp. 53, 56 (D. Mass. 1987). This decision holds that where a plaintiff has established personal jurisdiction over a nonresident defendant under one state law cause of action, the forum court will exercise jurisdiction over that defendant with respect to other related state claims. *Id.* Uncited by Corning, but equally pertinent, is the holding in *Home Owners Funding Corp. of America v. Century Bank,* 695 F.Supp. 1343, 1345 (D. Mass. 1988), that, "The law is settled that, in a multicount complaint, if a court has personal jurisdiction over a [nonresident] defendant with respect to one count, it has personal jurisdiction over the defendant with respect to all counts." In view of *Val Leasing* and *Home Owners Funding Corp.,* the *Bowers* district court ruling stands as a ruling unique to the particular facts and equities of that case.

Whatever the alleged split among the district courts, Corning directs our attention to no split among the Circuit Courts of Appeals themselves on the question of whether a federal court, once it has found long-arm jurisdiction over a nonresident defendant under one state claim in a diversity complaint, may then assert personal jurisdiction over that defendant in regard to the remaining state claims in the complaint.[6]

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6. The split which Corning alleges to exist (Pet., p. 16) concerns the issue of whether, once jurisdiction over a foreign defendant is established under a plaintiff's *federal* claim, may personal jurisdiction be extended over the defendant as to the plaintiff's state claims. *Oetiker v. Jurid Werke G.m.b.H.,* 556 F.2d 1, 5 n.10 (D.C. 1977). Moreover, while the *Oetiker* opinion cited by Corning recognizes a split between those federal court decisions (and treastise authorities) which favor jurisdiction over state claims

Finally, it is significant that Corning makes no claim that being required to defend in Pennsylvania on *both* the Storage Agreement count *and* the Sales Agreement count would cause Corning inconvenience, would be unfair, or would not be in the interest of judicial economy. *Cf. United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966). Corning likewise makes no assertion that the Storage Agreement count and the Sales Agreement count do not "arise from the same nucleus of facts" *Id.*

Notwithstanding the above-noted omissions by Corning, Corning's dire prediction that permitting the Third Circuit Court's decision in *North Penn v. Corning* to stand will undermine this Court's holding in *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984), must be viewed as fanciful, if not totally misplaced. *Helicopteros,* once again, is a general jurisdiction and *not* a special jurisdiction suit. Therefore, the considerations that prevail in the *Helicopteros* opinion concerning general personal jurisdiction will remain unaffected by the Third Circuit's minimum contacts findings in *North Penn v. Corning.*

NOTES *(Continued)*
in the described circumstance and the "older" district court decisions that disapprove of such jurisdiction, *Id.,* no split among the *Circuit Courts* themselves on even this particular issue is identified either in *Oetiker* or by Corning.

CONCLUSION

For the reasons stated above, respondent North Penn Gas Company respectfully requests that the petition for writ of certiorari of Corning Natural Gas Corporation be denied.

Respectfully submitted,

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